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Dissent of Commissioner Geoffrey Brown

The majority decision ("the Broadband Report"), authored by Commissioner Kennedy, fails California on several fronts. It's not what the legislature mandated. It's not what California schools and libraries need. And it's full of more accolades and wishful thinking than substance. It omits any serious analysis of competition, though the law requires it. It omits any serious discussion of consumer protection, though the law requires it. Worse still, it does nothing to tell us what broadband will do to standard telephony and our Universal Service programs.

The legislature instructed us to develop a plan for encouraging widespread availability and use of advanced telecommunications infrastructure. The statute called for participation by entities we do not regulate, that is, cable and satellite, as well as community organizations, such as libraries and schools.

The law required us to identify factors preventing ubiquitous availability of broadband and comparable services. It asked us to address encouraging investment. It required us to consider competition and anti-competitive behavior, something that Commissioner Kennedy's report studiously avoids. Even Commissioner Grueneich's heartfelt request for the inclusion of innocuous, face-saving language in support of competition to Commissioner Kennedy's chief of staff was summarily rebuffed.

My office was originally of the view that Commissioner Kennedy's Broadband Report was merely a pro-industry puff piece that sang the praises of a new technology and cautioned against over-regulation. This is, after all, an inoffensive sentiment and this is the sort of report that gathers dust in legislative libraries.

It was only when we re-read Public Utilities Code §709.3 and §709, which the report consistently refers to by its bill number of three years ago, that we took a different view. At an advisors' meeting, one of the authors of Commissioner Kennedy's report denied with great vehemence that there was *any* staff report on broadband. Further inquiries were met with more heated denials. We found this curious.

I don't think I'm telling tales out of school to say that telecom controversies here are quite heated, that staff is quite apprehensive about offending Commissioner Kennedy, and that my office has been kept largely out of the loop.

Finally, I called Director of the Telecommunications Division to my office and asked a series of specific questions about staff's work on this matter. It turned out there ***was*** a significant amount of staff work done (some 300 pages). I believe it was much more responsive to the requirements of the statute. Unfortunately, about 90% of the staff work was omitted from Commissioner Kennedy's report.

My office largely incorporated that staff work into our alternate, which was pulled together in less than one day. Our report comes to fewer conclusions than does Commissioner Kennedy's, but it adheres much more to the legislative mandate.

Now, I'm not so unrealistic as to believe (with two unconfirmed commissioners whose nominations can be withdrawn at any time and a commissioner whose presidency can be terminated at any time) that my alternate was going to prevail. Nonetheless, I wanted to warn of the consequences of this starry-eyed embrace of deregulation, under the guise of technological wizardry.

There should be no mistake about what Commissioner Kennedy's report represents. It is an emblem of a concerted campaign to effectively kill all regulation of telephones by state governments and, contemporaneously, to emasculate federal regulation. In at least 14 states, incumbent telephone companies are waging precisely the same type of campaign that Enron and the merchant generators waged on behalf of energy deregulation a decade ago.

There is a fundamental difference between energy deregulation and telephone deregulation. Because they were less concentrated, energy generation and transmission firms were less prone to market power during the energy crisis, than telephone ratepayers will be a year from now when the incumbents' consolidations and the market shake-out are complete.

The elimination of effective state regulation of telephones augurs for a state government as impotent and pathetic in the face of increased telephone costs as was Gray Davis' administration on energy costs. Only a decade ago, this Commission failed California by not insisting on safeguards against anti-competitive behavior. For us to now forego safeguards against anti-competitive behavior in telecommunications is nothing less than surreal. This debate is not about "cost of service" regulation versus light-handed regulation. In essence, this is about ***no*** regulation whatsoever. And if the energy crisis taught us anything about market power, it was that ***businesses*** California wants to keep and attract got hurt as much as anyone.

In addition to failing to discuss market power, Commissioner Kennedy's report fails to address broadband deployment's impact on Universal Service. It might at first not seem apparent that broadband deployment and Universal Service are related.

One cannot address broadband without addressing Voice over Internet Protocol. VoIP requires a broadband connection. It is an efficient technology that is rapidly getting its kinks worked out. Efficient as it is, VoIP's main savings come from not paying access charges and other surcharges which fund Universal Service programs. The Kennedy report does not address the implications of VoIP on Universal Service in other than a cursory manner. By so doing, it glosses over what may be broadband's biggest effect on telecommunications: higher telephone costs for people who either don't want or ***can't*** get broadband. Not coincidentally, Commissioner Kennedy's report omits our own

Telecommunications Division's estimates of the costs of VoIP to universal service programs.

Confusingly, at the same time her report cites a benefit of VoIP as avoiding Universal Service toll charges, it recommends (at p. 90) that VoIP providers, who do not pay into the Universal Service funds, be permitted to draw from those funds. How regular land lines can compete with a service they are being taxed to subsidize is simply not addressed.

Commissioner Kennedy once lamented the tendency of industry to ask government to finance development of its market under the rubric of community benefit. One cannot but wonder whether her report leads us precisely down the same road of trying to anticipate market winners, instead of technological neutrality.

For all we know, *wireless* broadband is the wave of the future because such networks can be installed much more cheaply than the fiber that our incumbents and cable companies now install with such great enthusiasm. ***Or***, it may be that broadband over power lines will turn out to be practicable and efficient. We don't know. What we do know is that if the government rushes into the wonderland of broadband self-congratulation and predictions of economic advancement, it probably will bet on subsidizing the most expensive horse in the race.

The proposed report fails on two major fronts that the Legislature instructed us to address. First, where is broadband competition right now? And what can the Public Utilities Commission do to implement increase broadband utilization right now?

The Telecommunications Division has for years struggled with getting information about broadband deployment from the cable industry, having to buy data on the open market rather than it being provided directly by the industry. At least one cable industry representative offered to make that information available at the broadband *en banc* in this proceeding. Yet that information is lacking in this report, which depends in great part on FCC data at the zip code level.

Why is the granularity of the information so important? Specificity and detail are required if we are to ascertain whether there really is any real competition in a zip code. ***Census tract data would permit us to know how many people actually have competing broadband providers.*** Zip code populations vary widely, as Map 3 (in both reports) makes clear. 51% of California Zip codes have fewer than 5,000 people in each code. 28% of California zip codes have between 5,000 and 100,000 people. The remaining 21% have between 100,000 to 4 million people. Just because there are eight broadband providers in a zip code with 4 million people doesn't mean that there is necessarily a single street where cable and DSL actually compete.

The carriers and the cable providers know where the competition is. Only the ***government*** doesn't know. And if we were to ask for the data, that is already compiled, the incumbents would fight us for years as SBC did on customer satisfaction surveys.

Similarly, the cable companies have been telling us we lack jurisdiction to get their proprietary information.

To know whether there is any real broadband competition, we need census tract data. As long as the data is not made available, the broadband providers hoping either to deregulate or to sup at the trough of government can assert that there is plenty of competition while we remain in the dark.

Government is bad enough when it tries to pick winners when it ***has*** accurate information. It is terrible, when it predicts without it. Zip code based information on broadband deployment is, at best, weak, and at worst, a broad brushstroke propaganda tool for deregulation.

Current legislation, SB 850, would require both cable and phone companies to provide their broadband data on the Census Block Group level. This data is currently available – the carriers use it every day – they just won't share it with us. Maybe they are afraid of what policy makers will think when they see the paltry nature of their much-heralded competition.

An additional shortcoming I see in this report is its omissions on the Teleconnect fund (which subsidizes library, school, and non-profit advanced telecommunications). Public Utilities Code §884 includes DSL as an advanced telecommunication service. Commissioner Kennedy's report mentions that carriers are not providing DSL from the fund but fails to mention that the law expressly sought to provide DSL to schools and libraries.

Confusingly, the report praises SBC's affiliate ASI for offering advanced telecommunications services which, at least according to SBC, no one is using. More importantly SBC's affiliate ASI *does not* offer DSL for the schools and non-profits that are fund customers. ASI gets a subsidy for half of the price it charges for providing telecommunications to non-profits, schools, libraries and the like, yet it won't provide DSL to them.

At the heart of this matter is the one thing Commissioner Kennedy's report champions over everything – our state's *ostensible* lack of jurisdiction over broadband and IP services. In fact, carriers will tell you point blank their belief that California has no right to subsidize DSL because DSL is an interstate service, in spite of §884. As if to embrace their position, Commissioner Kennedy's report specifically dropped language from an earlier version saying "The CPUC has determined that CTF discounts apply to all services deemed CTF eligible, irrespective of the inter- or intra- state nature of the service."

Commissioner Kennedy's report doesn't include this language because the essence of this report is the evisceration of state jurisdiction in deference to federal preemption.

Certainly the FCC's recent Vonage decision would seem to render all IP telephony, *which should be almost all telephony within a few years*, beyond the scope of state jurisdiction. This sweeping decision, which if upheld, places the PUC in the position of groveling supplicant before the FCC. This Commission, in what I believe to be an egregious abdication of its legal responsibilities, withdrew its lawsuit challenging the Vonage decision, thereby acquiescing in its virtual emasculation in telephone regulation. For us to give up the essence of our enforcement jurisdiction to federal preemption without so much as a whimper is to me a dereliction of our duty to uphold the law (not least of which is the intent behind California Constitution Section III, Article §3.5, prohibiting administrative agencies' declarations that a law is unconstitutional in the absence of an appellate decision in support thereof.[1]

At no point does the majority consider what acquiescence to FCC preemption of internet protocol telephony will mean. It will mean the same sort of impotence in telephony that the PUC exhibited before FERC in the energy crisis after the flaws in our deregulation law were discovered. Our rail safety regulation is in a comparable position before the Federal Rail Administration. The FRA does nothing about runaway trains and then ignores President Peevey's letters of protest. Our energy refund litigation for the Enron-type rip-offs is in a comparable position before FERC. FERC has found a myriad of ways to avoid finding that the energy traders ripped California off for billions of dollars. Our Liquefied Natural Gas safety concerns are in a comparable position before FERC, which says it will do a safety analysis *after* it approves a terminal.

In spite of the remarkable similarity between preemption by FERC and FRA and that of the FCC on VoIP, we withdrew our litigation to challenge and clarify the Vonage decision. If each time our independent state jurisdiction is impugned by a monopoly utility, we surrender without question to the federal government, our sworn oath as a sovereign state commission in a federal system is denigrated. Now admittedly, surrender *is* a strategy. It is just not a wise one. To my mind, we are yielding our most important purposed: to listen to the public's problem with licensed monopolies and to redress them.

Where are we when California's DSL providers (SBC is not alone on this) brazenly refuse to participate in a legislatively mandated program to lower the costs of

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[1] Cal Const, Art III § **3.5** provides:

§ **3.5.** Limitation on powers of administrative agencies

An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:

(a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;

(b) To declare a statute unconstitutional;

(c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.

DSL to healthcare centers, schools, and libraries? Where will we be if the recommendations of this report are adopted? I can assure you that *wherever* broadband deployment is in the future, if this report's abdication of jurisdiction is adopted, we will be on the sidelines. Our schools, libraries and community heath centers may well be paying through the nose for yesterday's technologies, with entire neighborhoods effectively redlined from broadband technology.

I attach and incorporate by reference my alternative Broadband Report, in order that the manifest differences in approach, analysis, and compliance with legislative mandate are available for consideration. For the foregoing reasons, I respectfully dissent.

Dated May 5, 2005, at San Francisco, California

/s/ GEOFFREY F. BROWN
GEOFFREY F. BROWN
Commissioner